FILED
FEB 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 15-1194

IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari
to the Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONER

Glenn Gerding
Appellate Defender
OFFICE OF THE
APPELLATE DEFENDER
123 West Main Street
Suite 500
Durham, NC 27701

David T. Goldberg
Counsel of Record
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 498-8229
dgoldberg@law.stanford.edu

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 3

I. The First Amendment Forbids Section 202.5's Crime-Prevention-Through-Speech-Prevention Approach 3

II. Section 202.5 Is Not a Reasonable Time, Place, or Manner Regulation 5

A. Section 202.5 Fails Narrow Tailoring Because It Forbids and Punishes a Vast Amount of Speech Unrelated to the Protection of Minors 6

B. There Are Many Realistic, More Speech-Respecting Alternatives to Section 202.5 7

C. Section 202.5 Does Not Further the Purposes Invoked to Justify It 11

D. Section 202.5 Forecloses Centrally Important Channels for First Amendment Activity 14

E. The State's Statutory Construction Argument Is Both Wrong and Irrelevant 15

III. Section 202.5 Is Unconstitutional in This and Every Case 18

IV. Speaker-Based Discrimination Is a First Amendment Vice 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) ..... *passim*

Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.,
482 U.S. 569 (1987) 7

Bragdon v. Abbott,
524 U.S. 624 (1998) 16

Brandenburg v. Ohio,
395 U.S. 444 (1969) 3

Bridges v. California,
314 U.S. 252 (1941) 22

Brown v. Entertainment Merchants Ass'n,
131 S. Ct. 2729 (2011) 14

Citizens United v. Federal Election Commission,
558 U.S. 310 (2010) 21, 22

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 6, 14

Cohen v. California,
403 U.S. 15 (1971) 23

De Jonge v. Oregon,
299 U.S. 353 (1937) 3

District of Columbia v. Heller,
554 U.S. 570 (2008) 23

Doe v. Harris,
772 F.3d 563 (9th Cir. 2014) 11

Doe v. Harris,
2013 WL 144048 (N.D. Cal. Jan. 11, 2013) 11

Doe v. Prosecutor,
705 F.3d 694 (7th Cir. 2013) 6

Elonis v. United States,
135 S. Ct. 2001 (2015) 19, 20

Gitlow v. New York,
268 U.S. 652 (1925) 3

Greater New Orleans Broadcasting Ass'n v. United States,
527 U.S. 173 (1999) 21

Heffron v. International Society for Krishna Consciousness, Inc.,
452 U.S. 640 (1981) 21

Kansas v. Hendricks,
521 U.S. 346 (1997) 10

Lloyd Corp. v. Tanner,
407 U.S. 551 (1972) 19

Madsen v. Women's Health Center, Inc.,
512 U.S. 753 (1994) 11

McCullen v. Coakley,
134 S. Ct. 2518 (2014) 8, 21

McIntyre v. Ohio Elections Commission,
514 U.S. 334 (1995) 23

Near v. Minnesota,
283 U.S. 697 (1931) 5, 22

Richardson v. Ramirez,
418 U.S. 24 (1974) 23

Riley v. California,
134 S. Ct. 2473 (2014) 14

Schneider v. Town of Irvington,
308 U.S. 147 (1939) 5

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991) 22

State v. Wray, No. 17CR-050269 (N.C. Dist. Ct. Jan. 26, 2017) 17

Thompson v. Western States Medical Center, 535 U.S. 357 (2002) 5

Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622 (1994) 21

United States v. Albertini, 472 U.S. 675 (1985) 7

United States v. Alvarez, 132 S. Ct. 2537 (2012) 20, 22

United States v. Kebodeaux, 133 S. Ct. 2496 (2013) 10

United States v. Sofsky, 287 F.3d 122 (2d Cir. 2002) 11

United States v. Stevens, 559 U.S. 460 (2010) 19, 23

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 20

Virginia v. Black, 538 U.S. 343 (2003) 19

Ward v. Rock Against Racism, 491 U.S. 781 (1989) ..... *passim*

Whitney v. California, 274 U.S. 357 (1927) 3

Constitutional Provisions

U.S. Const., amend. I ..... *passim*

U.S. Const., amend. XIV 23

Statutes and Regulations

28 C.F.R. § 41.31(b)(2) 16
N.C. Gen. Stat. § 14-196.3(e) 8
N.C. Gen. Stat. § 14-202.3 9
N.C. Gen. Stat. § 14-202.5 ..... *passim*
N.C. Gen. Stat. § 14-202.5(a) 16
N.C. Gen. Stat. § 14-202.5(b) 13
N.C. Gen. Stat. § 14-202.5(b)(1) 13
N.C. Gen. Stat. § 14-202.5(b)(3) 15, 16, 17, 18

Other Authorities

Berson, Ilene R., *Grooming Cybervictims: The Psychosocial Effects of Online Exploitation for Youth*, 2 J. Sch. Violence 5 (2003) 13

Facebook, *Statement of Rights and Responsibilities*, ... 20

Mitchell, Kimberly J. et al., *Use of Social Networking Sites in Online Sex Crimes Against Minors*, 47 J. Adolescent Health 183 (2010) 9, 12

Perez, Sarah, *YouTube Gets Its Own Social Network with the Launch of YouTube Community*, TechCrunch (Sept. 13, 2016) 17

QuickFacts: North Carolina, U.S. Census Bureau 6

Twitter, *Twitter Usage* 6

United States Department of Justice, Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* (2012) 10

Wolak, Janice et al., University New Hampshire Crimes Against Child Research Center, *Trends in Arrests of "Online Predators"* (2009) 12

Wolak, Janice & David Finkelhor, *Are Crimes By Online Predators Different from Crimes By Sex Offenders Who Know Youth In-Person?*, 53 J. Adolescent Health 736 (2013) 12

REPLY BRIEF FOR PETITIONER

The State no longer argues that Section 202.5 is mere "conduct regulation," Pet. App. 9a, and now recognizes that Section 202.5 restricts "protected speech," Resp. Br. 16, 24.

In fact, the burdens Section 202.5 imposes are unusual and severe. It forbids vast amounts of First Amendment activity on the very platforms over which Americans increasingly exercise their rights to speak, assemble, and petition the government. It operates selectively, singling out a small and unpopular segment of the State's population. And it does so through criminal punishment.

The State does not dispute any of this. Nor does it deny that almost all the protected activity Section 202.5 suppresses has nothing to do with criminal behavior. The State instead emphasizes Section 202.5's "preventative" bona fides, explaining how a "predator" could gather information on a social networking site as a "critical first step," Resp. Br. 35, 42, toward reprehensible crime. But that is not a First Amendment argument. The distance separating the power the State asks the Court to recognize and what the Constitution permits is the difference between a "prelude," *id.* 18, and a "clear and present danger." The First Amendment disables the State from punishing innocent, constitutionally protected activity on the ground that it could lead to crime *if engaged in by someone with criminal intent.*

Equally bootless is the State's campaign to have the Court review Section 202.5 as if it were a content-neutral time, place, or manner regulation. Section 202.5 is not such a law. But applying the test from *Ward v. Rock Against Racism*, 491 U.S. 781 (1989),

does not make Section 202.5's core defect—vast overbreadth—disappear. *Ward* directs that a law is unconstitutional when a "substantial portion" of its burdens falls on speech that does not implicate the evil targeted. *Id.* at 799. The State does not acknowledge that Section 202.5 imposes *any* unnecessary burdens and seeks to steer the Court as far away from narrow tailoring as possible. (Indeed, the State's "narrow construction" argument is just such a digression.) Section 202.5 in fact fails all the *Ward* prongs. As with any overbroad law, workable, less restrictive alternatives to Section 202.5 abound. But because the State fails to see cases like petitioner's as posing genuine First Amendment *problems*, it refuses to seriously consider measures that would target culpable actors *without* needlessly criminalizing core political and religious speech. The State's other arguments do little but reinforce the impression that Section 202.5 cannot be upheld under ordinary First Amendment rules. The Court's precedents foreclose the State's ill-considered suggestion of unrestrained governmental power to punish speech that violates a private contract. And there is not, as the State suggests, a "tradition" of depriving free speech rights based on prior convictions. *See* Resp. Br. 19. Were the Court to declare speaker-based discrimination a "virtue, not a vice," *id.* 11, things would not go well for the First Amendment.

ARGUMENT

I. The First Amendment Forbids Section 202.5's Crime-Prevention-Through-Speech-Prevention Approach.

1. Section 202.5 criminalizes core First Amendment activities without requiring any proof that they were connected to impermissible behavior. The State justifies that regime on the ground that accessing social networking sites can be a "critical first step" toward committing a serious crime. Resp. Br. 35.

Landmark First Amendment precedents reject this "first step" rationale. This Court's decisions settle that "[t]he prospect of crime . . . does not justify laws suppressing protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). Rather, they hold that the government may punish a person for First Amendment activity that is not itself criminal only if it proves a tight nexus between the person's speech and the "lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam); *see also De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937); Petr. Br. 30-31. Were it otherwise, states could criminalize reading newspapers on the theory that gathering information about a government official's speaking schedule is a "critical first step" to planning an attack. *See Brandenburg*, 395 U.S. at 447 (describing as "thoroughly discredited" the "bad tendency" First Amendment standard applied in *Whitney v. California*, 274 U.S. 357 (1927) and *Gitlow v. New York*, 268 U.S. 652 (1925)).

2. There is a close resemblance—not a "world of difference," Resp. Br. 23—between this case and *Free Speech Coalition*. If anything, Section 202.5 is an even stronger candidate for invalidation than was the

statute there because the speech burden here is so far-reaching and indiscriminate, and the possible harm, so attenuated.

In *Free Speech Coalition*, the First Amendment activity the Court characterized as "innocent in [itself]" was possessing "virtual child pornography." 535 U.S. at 251. The Government defended its power to impose punishment based on detailed congressional findings that such material "can lead to actual instances of child abuse," both by enabling pedophiles to use the materials to "seduce children" and by making it difficult to convict persons for possessing or distributing actual child pornography. *Id.* at 250-51. The Court, however, rejected that assertion, explaining that the Government's rationale had "no justification in our precedents or in the law of the First Amendment." *Id.* at 256.

Precisely the same First Amendment principles indict Section 202.5. The fact that a social networking website "might be used for immoral purposes," *Free Speech Coalition*, 535 U.S. at 251, by someone with criminal intent does not confer the power to prohibit speaking or reading information on such sites. Indeed, rather than confining itself to one constitutionally protected but rather disgusting type of speech, Section 202.5 forbids vast swaths of core political, religious, and artistic expression. *See* Petr. Br. 18-21; Amicus Br. of EFF 8-24. And it does so without explaining *how* such activity could possibly lead to the commission of the criminal acts the State seeks to prevent.

3. The State cannot distinguish away *Free Speech Coalition* by asserting that the decision condemns only laws drawing "content-based" distinctions. *See* Resp. Br. 23-24. Congress could not have prohibited *all*

visual images on the ground that (1) some of them might be virtual pornography and (2) some of those images might contribute to the commission of a crime. Achieving "neutrality" by preventing even more speech from occurring is not what the First Amendment counsels. That is the plain import of *Near v. Minnesota*, 283 U.S. 697 (1931). There, the Court struck down a law that prevented persons previously convicted for publishing "criminal libel[s]" from accessing their presses based on the prospect that some of them might reoffend. *Id.* at 710.

Rather, as the Court explained in *Free Speech Coalition* itself, the government may violate the First Amendment "mandate in many ways," of which departures from content neutrality are just one. 535 U.S. at 244. The Court's decision is best understood as condemning laws that punish otherwise "innocent" speech on the theory that doing so will prevent criminal conduct. That same First Amendment principle has been enforced in decisions holding undeniably content-neutral laws unconstitutional. *See, e.g.*, *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939) (striking down leafleting ban enacted to prevent littering). "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

II. Section 202.5 Is Not a Reasonable Time, Place, or Manner Regulation.

Contrary to the State's argument, Section 202.5 *is not* a "classic time, place, or manner" regulation. Resp. Br. 20. Unlike other laws the Court has analyzed under that rubric, Section 202.5 is a criminal statute, enforced only through felony prosecutions. The

metaphorical "places" in which it operates are continental in scope (Twitter's "population" is roughly 30 times North Carolina's[1]), and those "places" are not public property. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (contrasting the "constant and unavoidable" need for government to "mediate among various competing uses" of public venues with its narrower role in regulating speech on private property). And as explained below, Section 202.5 does not purport to treat would-be speakers evenhandedly. *See infra* 20-23.

In any event, whether or not it is useful to *analyze* Section 202.5 as a time-place-manner law, it is impossible to *uphold* it as one. The same defect that makes Section 202.5 plainly unconstitutional under *Free Speech Coalition* is what renders it unconstitutional under the *Ward* test: Virtually none of the vast amount of important First Amendment activity that Section 202.5 suppresses actually implicates the law's crime-prevention purpose.

A. Section 202.5 Fails Narrow Tailoring Because It Forbids and Punishes a Vast Amount of Speech Unrelated to the Protection of Minors.

1. Lost in the welter of argument about tiers of scrutiny and recidivism data is this fact: Respondent nowhere disputes that the evil the State aims to combat—gathering information for criminal purposes—accounts for a "minuscule" fraction of the First Amendment activity that Section 202.5 suppresses. *See Doe v. Prosecutor*, 705 F.3d 694, 699

---

[1] *Compare QuickFacts: North Carolina*, U.S. Census Bureau, http://bit.ly/2lRf6Y9 (10 million), *with Twitter Usage*, Twitter, http://bit.ly/1mjyzhm (313 million).

(7th Cir. 2013). This failure is all the more glaring because *Ward* itself teaches that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." 491 U.S. at 799.

The First Amendment activity that Section 202.5 criminalizes is both enormous in scope and enormously important. *See* Petr. Br. 18-21; Amicus Br. of EFF 8-24. The law does not merely forbid a registrant from contacting a teenage account-holder (or from visiting her profile page). It prohibits him from "following" the President's Twitter feed or searching for a job on LinkedIn simply because some of those sites' hundreds of millions of users are under age 18 (and without regard to whether those sites allow adult users to view or access the profiles of minor users, *see* Petr. Br. 5-6).

This is Section 202.5's core overbreadth problem. Like the measure invalidated in *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), Section 202.5 suppresses all "First Amendment activities," *id.* at 574, without any effort to target activities implicating the government interest. Indeed, Section 202.5 is analogous to excluding solicitors from California, lest they take the "critical first step" toward soliciting in the LAX central terminal. Resp. Br. 35.

B. There Are Many Realistic, More Speech-Respecting Alternatives to Section 202.5.

1. The State's brief fails to demonstrate that the General Assembly considered any less restrictive alternative to Section 202.5. Instead, the State says that it need not refute every "imaginable alternative," Resp. Br. 44 (quoting *United States v. Albertini*, 472

U.S. 675, 689 (1985)), and that its "legislature's judgment" should not be "second-guess[ed]," Resp. Br. 40. But as *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), teaches, the State must present credible evidence as to why it was unable to address the problem "with less intrusive tools readily available to it." *Id.* at 2539.

The State's rote responses miss the point of the narrow-tailoring analysis. The First Amendment requires legislatures to see speech suppression as a "last resort." Total exclusion from social networking sites—and criminal punishment for religious speech—should at the very least have been recognized to pose serious First Amendment problems. And many ways of avoiding or reducing these burdens, *see* Petr. Br. 47-54, can be found in this Court's precedents, North Carolina's related statutes, and other states' responses to the same "national" problem, *see* Resp. Br. 31; Amicus Br. of State of Louisiana et al. 27-33 (only one other state—Louisiana—takes an even arguably comparable approach to North Carolina's).

2. The State does not address—much less explain—how codifying an affirmative defense, *see* Petr. Br. 49-50, would be any less "effective" than the current law. The State could still initiate a prosecution against the same registrants it does now. The only difference would be that registrants like petitioner, whose website activities are demonstrably innocuous, would not be convicted. And there is nothing "inapposite," Resp. Br. 45, about including an exception like the one in the State's cyberstalking law, N.C. Gen. Stat. § 14-196.3(e) ("This section shall not be construed to impair any constitutionally protected activity, including speech.").

3. Respondent fails to explain why a law directly targeted at information-gathering for improper purposes would be less effective than Section 202.5. Such a law would spare the First Amendment rights of those, like petitioner, who use a site to speak or who "gather information" about, say, a local book fair. It would also reach—as does the State's computer-solicitation statute, *see* N.C. Gen. Stat. § 14-202.3—all "potential sex offenders," Resp. Br. 32, not just the small subset who are on the registry, *see* Kimberly J. Mitchell et al., *Use of Social Networking Sites in Online Sex Crimes Against Minors*, 47 J. Adolescent Health 183, 187 (2010) (finding that *non-registrants* account for 98% of arrests for offenses against minors in which social networking websites were involved).

The State is simply wrong that such a law would not prevent harm. *See* Resp. Br. 44. The threat of punishment deters wrongdoing, and "harvesting" could be detected through targeted sting operations or even through data analysis. And a person caught—or suspected of—engaging in other misconduct would face prosecution for any pre-solicitation "harvesting" an investigation might uncover.

In fact, the same fault respondent finds with this alternative applies fully to Section 202.5: The statute *prohibits* accessing certain sites, but it does nothing to *detect* whether someone has accessed those sites. The State's arguments about detection oscillate wildly—depending on whether it is addressing Section 202.5 or a potential alternative. In the latter instance, the State chides petitioner for assuming that would-be criminals will volunteer their internet identifiers, noting that "[m]any registered sex offenders falsify their identity," Resp. Br. 36, and "remain invisible on

a social networking site," *id.* 4. But when asserting Section 202.5's "efficacy," respondent presumes these same "surreptitious" predators will forthrightly provide their online identifiers to law enforcement. *See* Resp. Br. 35.

4. The State says almost nothing to justify the legislature's extraordinary decision to exclude *all* registrants from *all* activity on the proscribed platforms for decades. The State touts as "individualized" a procedure that effectively determines whether registrants are subject to lifetime or 30-year speech restrictions, Resp. Br. 47-48, but nowhere explains why the legislature could not have provided an avenue of relief for registrants the State itself determines pose a low risk.[2] It is commonplace

---

[2] The State repeats the statistic that previously convicted sex offenders have a "four times higher" sex-crime arrest rate than others. *See* Resp. Br. 37-38 (citing U.S. Dep't of Justice, Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* 93 (2012) ["*DOJ Report*"]). But the State omits the actual percentages: 5.3% versus 1.3%. *See DOJ Report* 93. That still means that 94.7% of sex offenders were not re-arrested on sex-crime charges during the relevant period. *Id.*; *cf. United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) (observing there is "conflicting evidence on" the issue of recidivism). Even if the State can constitutionally suppress speech and impose criminal punishment based on estimations of future risk, it surely may not do so on the ground that a person is a member of a legally created "class" that has a 5.3% average chance of re-offending. *See* Amicus Br. of Ass'n for the Treatment of Sexual Abusers et al. 11 (noting different types of offenders display different recidivism rates); *cf. Kansas v. Hendricks*, 521 U.S. 346, 358, 360 (1997) (upholding time-limited deprivation of physical liberty supported by rigorous individualized determination of uncontrollable danger).

for "preventative" restrictions imposed as part of *criminal sentences* to be individually tailored in breadth and duration. *See, e.g.*, *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (striking a probation condition that prohibited defendant convicted of receiving child pornography from accessing the Internet without permission). Section 202.5, inexplicably, accords less respect to the free speech rights of persons who have fully completed their sentences. *Cf. Doe v. Harris*, 772 F.3d 563, 572 (9th Cir. 2014) ("[R]egistered sex offenders who have completed their terms of probation and parole 'enjoy[] the full protection of the First Amendment.'" (alteration in original) (quoting *Doe v. Harris*, 2013 WL 144048, at *3 (N.D. Cal. Jan. 11, 2013))); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (applying narrowing requirements to speech injunctions).

C. Section 202.5 Does Not Further the Purposes Invoked to Justify It.

1. Section 202.5 is the rare law that is both vastly overbroad *and* plainly ineffectual. Child exploitation is a grave problem, but respondent offers no evidence—apart from unsupported assertions of "effectiveness"—that Section 202.5 has made any "dent," Resp. Br. 46, let alone one that would justify the far-reaching abridgments of free speech the law imposes. Respondent offers no statistics showing (or even claiming) progress compared to the 2008 figures it presents, *see id.* 31, or evidence that Nebraska or Indiana suffered setbacks when their essentially identical laws were held unconstitutional by federal courts. Nor does the State present even a single

anecdote of a would-be "predator" whose "harvesting" Section 202.5 thwarted.

Section 202.5 takes a very indirect approach to crime control—attempting to stop activity on certain websites by certain people, in the hopes of making it harder for would-be offenders to contact and then harm minors offline. On its own terms, Section 202.5 operates in a sliver of a corner of a large and complex problem. The vast majority of sexual offenses against minors do not involve the Internet, *see* Mitchell, *supra*, at 183-84 (online meeting offenses accounted for 615 out of 28,226 arrests in 2006), and the vast majority of sexual offenses are committed by non-registrants, *see id.* at 187.

If the General Assembly believed that registrants play an outsized role in *online* offenses, *see* Resp. Br. 32, or even that most online offenses are committed by strangers, it was mistaken. The very studies respondent cites say otherwise. *See* Janice Wolak & David Finkelhor, *Are Crimes By Online Predators Different from Crimes By Sex Offenders Who Know Youth In-Person?*, 53 J. Adolescent Health 736, 737 (2013) (There are "far more 'know-in-person' offenders" arrested for Internet-enabled offenses than "online-meeting offenders."). As the same researchers explain, public fears that "sex offenders are commonly using information that youth post online" to "track down unsuspecting victims" reflect a fundamental "misunderst[anding]." Janice Wolak et al., Univ. N.H. Crimes Against Child Research Ctr., *Trends in Arrests of "Online Predators"* 4 (2009).

2. But even within the narrow realm of preventing online information-gathering by registrants for improper purposes, Section 202.5 is ineffectual. The

State's brief itself explains how a registrant who actually accessed a website for predatory purposes could proceed surreptitiously, leaving Section 202.5 to catch only those who post openly. *See* Resp. Br. 36.

Worse still, not only is Section 202.5 overbroad, its requirements and exclusions undermine its purpose. For example, a "would-be predator" who actually "harvested" information about a minor would, inexplicably, go unpunished if he did so on a non-commercial website, *see* N.C. Gen. Stat. § 14-202.5(b)(1). Respondent attempts to defend exempting chat rooms, but it does not (and cannot) refute the broad consensus that such sites pose greater dangers for teenage users than do the ones Section 202.5 prohibits. *See* Petr. Br. 58-60 (explaining that exempted sites offer complete anonymity and generate no electronic data trail). Even the study the State cites, in an effort to rationalize the legislature's "judgment," is concerned exclusively with behavior in chat rooms. *See* Ilene R. Berson, *Grooming Cybervictims: The Psychosocial Effects of Online Exploitation for Youth*, 2 J. Sch. Violence 5 (2003). And the State's own suggestion, Resp. Br. 49-50, that it is perfectly permissible under Section 202.5(b) for a registrant to view everything on the proscribed websites so long as he asks a friend to print out materials for him, fatally undercuts any real function for Section 202.5.

The government need not proceed all at once. But a law, ostensibly enacted in response to a crisis of the highest order, that expressly exempts the most serious manifestations of the problem while suppressing large amounts of protected speech cannot be sustained.

D. Section 202.5 Forecloses Centrally Important Channels for First Amendment Activity.

To describe Section 202.5 as respondent does, as placing but "a few sites" off-limits, Resp. Br. 24, is no less truthful (but no less misleading) than saying a ban on circulating a magazine in Canada, the United States, Mexico, and Brazil applies to "a few countries in the Western Hemisphere."

These "few sites"—including Twitter, Facebook, YouTube, Instagram, and LinkedIn—play a central role in our Nation's political, cultural, spiritual, and economic life. The problem is not one of "[im]perfect substitute[s]" for these platforms, Resp. Br. 51, but the lack of any even remotely plausible ones, *see* Petr. Br. 55-56 (citing examples of political engagement, natural disaster response, education, and entertainment content that occurs exclusively through these sites); Amicus Br. of EFF 36-38 (explaining how "network effects" radically augment the value of users' speech on such sites). The patchwork of technologies and websites on which respondent says petitioner may still express an opinion or access discrete bits of information only proves the point. *See* Resp. Br. 49; *cf. Riley v. California*, 134 S. Ct. 2473, 2488-89 (2014) (emphasizing the "quantitative" and "qualitative" differences between a cellphone and a billfold).

Unable to plausibly dispute that these platforms are at least as important to expression and communication as the lawn signs in *Ladue*, respondent is left to argue that this medium is less "venerable." Resp. Br. 51 (quoting *Ladue*, 512 U.S. at 54). But that cannot be squared with the Court's First Amendment case law, *see Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (holding violent

"video games qualify for First Amendment protection"), especially when, as here, the focus is on a law's practical effect on individuals' present-day communicative activities.

E. The State's Statutory Construction Argument Is Both Wrong and Irrelevant.

The State devotes much of its brief to arguing a tertiary question: whether Section 202.5's "commercial social networking Web site" definition imposes a freestanding requirement that limits its prohibition to those sites which enable their members to include "links to other personal Web pages." *See* Resp. Br. 26-30. On the State's view, the "plain language" of Section 202.5(b)(3) establishes a "links" element for the statutory offense. And that element, the State further posits, is what defines "true social networking sites," *id.* 12—and what excludes, for example, the *New York Times* website.

1. Even if respondent were correct and only sites like Facebook, Twitter, LinkedIn, and Instagram were covered, Section 202.5 would be irredeemably overbroad. Indeed, if Section 202.5 just proscribed access to Twitter, it would still impose criminal punishment for the vast proportion of First Amendment activity on that platform which in no way implicates the evil against which Section 202.5 is directed.

2. But the State is incorrect. It seizes on the "plain language" of Section 202.5(b)(3), which includes the words "and links" as imposing an independent requirement. *See* Resp. Br. 12. This ignores, however, that those two words appear at the end of a list of items introduced by "such as." N.C. Gen. Stat. § 14-202.5(b)(3). In fact, as this Court has explained—

parsing a regulatory definition reading "functions *such as* caring for one's self, . . . breathing, learning, *and* working"—the phrase "such as" signals that none of the items enumerated on a list is required. *Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998) (emphases added) (quoting 28 C.F.R. § 41.31(b)(2)).[3]

The signals respondent claims to discern in the decision below are entirely illusory. The State presented this theory to the State Supreme Court, arguing that the Court of Appeals had erred by failing to perceive a freestanding "links" requirement that would exclude nytimes.com. *See* Appellant N.C. Sup. Ct. Br. 20-21. The North Carolina Supreme Court did not endorse that proposed reading. Instead, it assumed the lower court's reading was correct, but nevertheless concluded that sufficient alternatives remained. *See* Pet. App. 16a-17a. What respondent points to as "strong" support in the opinion for a "links" requirement is in fact none whatsoever. The court described Section 202.5 as targeting sites where visitors "could actually gather information," Resp. Br. 10 (quoting Pet. App. 25a). But that description self-evidently covers a profile page, *without links*, that displayed a teenage user's "photograph[]" and "other

---

[3] Treating "links to other personal Web pages" as a freestanding requirement also renders the surrounding text incoherent. Both Subsections 202.5(a) and 202.5(b)(3) clearly provide that sites that *do not* enable creation of "personal Web pages" may be covered (if they permit minors to "become members" or create "personal profiles," respectively). If all sites must "link[] to other personal Web pages," this definitional language would make no sense.

personal information." N.C. Gen. Stat. § 14-202.5(b)(3).

3. The ostensible "plain language" interpretation is inconsistent with the one adopted in the acknowledgment form the State elsewhere touts as attesting to petitioner's understanding of Section 202.5's prohibition. *See* Resp. Br. 52. That document—which the State created—makes no mention of "links," let alone a "links" requirement. *See* J.A. 140. Rather, the form's summary of Subsection (b)(3) says (consistently with the statutory language) that any site that "allow[s] users to create Web pages or personal profiles," is off limits. *Id.*; *see also* Trial Tr. 267 (jury instructions at petitioner's trial did not specify a freestanding "links" requirement).

4. Even now, there are reasons to doubt the real-world value of the State's interpretation. Nine days after the State's brief was filed, law enforcement authorities arrested a registrant for accessing Snapchat—an application that almost certainly could not meet a "link" requirement. *See* Warrant for Arrest, *State v. Wray*, No. 17CR-050269 (N.C. Dist. Ct. Jan. 26, 2017). And the State does not deny that registrants have been convicted for accessing YouTube, *see* Petr. Br. 8 n.2, a site that few would describe as a "social networking site," *cf.* Sarah Perez, *YouTube Gets Its Own Social Network with the Launch of YouTube Community*, TechCrunch (Sept. 13, 2016), http://tcrn.ch/2cVdvx0.

As amici explain, this definitional uncertainty is the beginning, not the end, of a parade of critical ambiguities. *See* Amicus Br. of CATO Inst. & ACLU 17-19. (It is unclear whether nytimes.com would be safe under respondent's theory if, say, a commenter

could link to a personal page in a comment.) No lawyer acquainted with the text and enforcement history of Section 202.5 and the State Supreme Court's opinion could responsibly counsel a registrant client as to which sites, including the *New York Times*, he could visit without risking prosecution.[4]

III. Section 202.5 Is Unconstitutional in This and Every Case.

"The facts of this case are illustrative," Resp. Br. 17, of the fundamental defects that afflict Section 202.5. Petitioner was convicted for engaging in fully protected First Amendment activity. And the State, which obtained petitioner's computer drives and Facebook account records, has never accused him of saying anything worse than "God is Good!" or of "harvesting" information at all. Thus, the fact that Section 202.5 treats as "irrelevant," *id.*, whether a registrant is using social networking sites for criminal or constitutionally-protected purposes is precisely the reason the law cannot stand.

1. The State's repeated attempts to justify petitioner's conviction based on an alleged "breach[of] Facebook's terms of service," Resp. Br. 6, need not detain the Court. Facebook's "term of service" played

---

[4] All the same points—especially irrelevance to the First Amendment question presented—apply equally to respondent's quarrel over the meaning of "access." *See* Resp. Br. 28 (claiming "access" requires logging into a site). Section 202.5(b)(3)'s text, which requires that information be viewable by a site's "users" or "visitors," all but rules out this reading. But text aside, it is strange—given the statute's avowed purposes and testimony in this case that personal information could be viewed on Myspace without signing in, *see* J.A. 12—that the State insists on the narrower reading.

no part in petitioner's indictment, trial, and conviction, or in the decision below sustaining Section 202.5. Indeed, the State continues to prosecute registrants under the statute for accessing sites—such as YouTube, Google+, and Instagram, *see* Petr. Br. 8 n.2—whose terms of service include no comparable restrictive provision, Amicus Br. of EFF app. 1, 5.

The notion that the First Amendment limits on governmental action apply only to speech a person has an "independent lawful right to make," Resp. Br. 54, under private contract or property law is flatly inconsistent with settled precedent. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 350, 367 (2003) (granting relief on First Amendment claim of defendant convicted for burning cross on African American neighbor's property); *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (overturning conviction of defendant for speech that would surely have violated Facebook's terms of use); *United States v. Stevens*, 559 U.S. 460, 465, 482 (2010) (invalidating ban applicable only to depictions of *unlawful* animal mistreatment).

Moreover, this case does not involve North Carolina's enforcing a private contract or petitioner's challenging contractual terms. It arises from the State's convicting and punishing petitioner under its criminal law. Indeed the lone decision respondent cites, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), reinforces petitioner's point. *See* Resp. Br. 53. *Lloyd Corp.* relied on the basic state action principle that private entities—be they operators of shopping centers or of websites—are not constrained by the First and Fourteenth Amendments. 407 U.S. at 568-69. Indeed, if, as respondent proposes, the government's powers to

impose criminal punishment really were coextensive with Facebook's, this Court's First Amendment doctrine would look very different. After all, Facebook bars:

- False personal information, *but see United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012);
- Unauthorized commercial communications, *but see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976);
- Hateful speech, *but see Elonis*, 135 S. Ct. at 2011;
- Nude, graphic, or gratuitously violent content, *but see Free Speech Coalition*, 535 U.S. at 240.

See Statement of Rights and Responsibilities, Facebook, https://www.facebook.com/terms.

2. Nor, contrary to respondent's intimations, *see* Resp. Br. 7, did petitioner engage in surreptitious use of social media. What respondent labels a "fictitious name," *id.*, is actually a common way many Facebook users identify themselves: the first name petitioner goes by in everyday life ("J.R.") plus his middle name A would-be offender seeking to proceed stealthily would not have established a publicly viewable Facebook profile that included, as petitioner did, his photograph and other personal information. *See* J.A. 136.

IV. Speaker-Based Discrimination Is a First Amendment Vice.

Respondent's argument leaves the rails when it claims that Section 202.5 depends "simply on 'where [people] say [something],'" Resp. Br. 17 (quoting

McCullen, 134 S. Ct. at 2531). To the contrary, Section 202.5 is directed at *who* the speaker is. For the vast majority of North Carolinians, saying "God is Good!" to Facebook friends when recounting an interaction with the judicial system is as First Amendment-protected as speech gets. But for individuals on North Carolina's registry, *that* speech becomes a felony.

1. This Court has repeatedly recognized that measures "select[ing] among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194 (1999). Indeed, neutrality among speakers is a defining feature of the time, place, or manner laws that respondent urges provide the relevant precedent for evaluating Section 202.5. *See Ward*, 491 U.S. at 787 (noise control measure applied to "all performances at the bandshell"); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (rule "applie[d] evenhandedly to all who wish[ed] to distribute materials" at state fair).

2. The State nonetheless persists, inviting the Court to treat the fact that Section 202.5 singles out only "a small percentage of the population," Resp. Br. 24, for far-reaching burdens as a positive good, not a "vice," *id.* 11. That assertion is a stark inversion of settled principles. To be sure, *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994), declined to apply strict scrutiny to the speaker-based distinction at issue. *See* Resp. Br. 18. But the Court has also said that laws that "identif[y] certain preferred speakers" can work "a constitutional wrong." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

3. The State's real submission is that abridgments of the free speech rights of "this class of individuals," Resp. Br. 20, is permissible. The State brandishes a list of "civil disabilities [imposed] on persons convicted of crimes even after they completed their criminal sentences," *id.* 18-19, to argue that "individuals who have proven themselves unable to abide by society's laws," *id.* 43, enjoy permanently diminished First Amendment protection. That is wrong.

None of the civil disabilities on the State's list involves a forfeiture of free speech rights. Thus, states may deny many important benefits based on criminal convictions: government jobs, occupational licenses, and security clearances. *See* Resp. Br. 19. But the rights the First Amendment secures do not "derive from the beneficence of the state," *Alvarez*, 132 S. Ct. at 2550, so a person previously convicted, who is no longer serving a sentence, has an equal right to "speak his mind," *Bridges v. California*, 314 U.S. 252, 270 (1941).

That principle was enforced in *Near* when the Court invalidated a law withholding rights to publish based on prior convictions. *See* 283 U.S. at 738. And *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), offered one important reason for affording full protection: persons who have been criminally convicted have important things to say. *Id.* at 121 (noting Malcom X and Henry David Thoreau are among "American prisoners and ex-prisoners" who wrote about their experiences). For persons who are subject to the many other disabilities respondent describes, "the right to use speech to strive to establish

worth, standing, and respect" is especially valuable. *Citizens United*, 558 U.S. at 340-41.

The Court's decisions in *Richardson v. Ramirez*, 418 U.S. 24 (1974) and *District of Columbia v. Heller*, 554 U.S. 570 (2008), addressing governmental power to restrict voting rights and gun ownership of those formerly convicted, do not, as respondent presumes, supply new authority to suppress speech. *See* Resp. Br. 19. As those decisions make clear, the contours of the rights at issue, like those under the First Amendment, are informed by history and "tradition." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *see Richardson*, 418 U.S. at 48-49 (discussing text of Fourteenth Amendment in light of state practice of disenfranchising felons contemporaneous with ratification); *Heller*, 554 U.S. at 626 (recognizing historical limitations on the right to carry weapons). *Heller*'s observation that guns may be barred from government buildings, 554 U.S. at 626, did not signal a retreat from *Cohen v. California*, 403 U.S. 15 (1971). Nor, presumably, would a decision upholding licensing of firearms dealers grant authority for licensing book sellers.

4. In the end, the State's request to recognize a class of lower-value speakers—that is, a group whose First Amendment rights are entitled to less protection—would be a step no less "startling and dangerous" than the lower-value *speech* theory this Court rejected in *Stevens*, 559 U.S. at 470. That the State would assert that discrimination is a "virtue" in support of a law singling out a "small percentage of" the State's citizens who are feared and despised is an independent reason for disapproval.

CONCLUSION

For the foregoing reasons, the decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

Glenn Gerding
Appellate Defender
OFFICE OF THE
APPELLATE DEFENDER
123 West Main Street
Suite 500
Durham, NC 27701

David T. Goldberg
Counsel of Record
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 498-8229
dgoldberg@law.stanford.edu

February 16, 2017